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KU ABDUL RAHMAN KU ISMAIL v. MUNA MOHD JAAFAR & ORS

HIGH COURT MALAYA, GEORGETOWN
LIM CHONG FONG JC
[CIVIL SUIT NO: 22NCVC- 47-04-2015]
B 29 AUGUST 2016

TORT: *Defamation – Libel – Article published in newspaper – Article involving judicial proceeding where counsel criticised by judge for acting without valid practising certificate – Reasonable journalism – Whether prima facie case of libel* C *made out – Whether defence of qualified privilege applied*

The plaintiff was counsel for an accused in a criminal case at the High Court. When the case was came up for continued hearing, the first defendant ('DPP') informed the judge that the plaintiff did not have his practising certificate for 2014 as required under the Legal Profession Act 1976. The D judge then directed the plaintiff and the DPP to file written submissions as to whether the case could continue or had to re-commence *de novo*. The third defendant was a journalist employed by the Star Publications Berhad ('fourth defendant') who was present in the court to provide press coverage of the proceedings for the fourth defendant. The fourth defendant published an E article captioned 'lawyer told off over expired cert 'irresponsible act' may have affected hearing of drug trafficking case' ('impugned article'). Subsequently, the judge permitted the plaintiff to continue with the case from where it was left off after being satisfied that the plaintiff could validly conduct the case pursuant to s. 29(3) of the Legal Profession Act 1976. The F plaintiff filed the present action against the defendants alleging that the impugned article constituted a grave libel which jeopardised the plaintiff's professional reputation and caused the plaintiff to suffer irreparable damage. The plaintiff had also alleged that the third defendant was malicious in that she sought clarification from the DPP but not from the plaintiff. The issues G that arose for determination, *inter alia*, were (i) whether a *prima facie* case of *libel* had been made out against the defendants; (ii) if yes, whether the *prima facie* case had been negated by the defence of qualified privilege; and (iii) whether the fourth defendant had satisfied the test responsible journalism.

H **Held (dismissing plaintiff's action with costs):**

(1) The impugned article was published on the next day after the court proceedings. This is not abnormal or sinister because the reporting of court proceedings is usually reported contemporaneously by reason that news is a perishable commodity. Further, the fourth defendant being one I of the leading newspaper publishers in the country has the duty to disseminate news that includes the reporting of judicial proceedings to the Malaysian public at large. In this sense, the public interest test is therefore met. The test of responsible journalism has been satisfied by the fourth defendant. (paras 44 & 45)

(2) The reporting made by the third defendant was fair, accurate and contemporaneous. Although the contents of the impugned article contained serious accusations made against the plaintiff, it primarily reflected the actual exchanges that went on between the judge, DPP and the plaintiff in the courtroom as observed by the third defendant. Beyond the third defendant's report, there was merely supplementation added into the impugned article by the fourth defendant, *inter alia*, by way of the caption which was a fair and reflective of the contents of what actually happened in court. (para 46)

(3) The third defendant had checked with the DPP to satisfy herself what she had heard in the court was correct. There was nothing malicious in so checking. In fact, the third defendant was wise to have done so to ensure accuracy in the reporting. Besides that, there was no other instance of malice advanced by the plaintiff. In the absence of malice, the third and fourth defendants had successfully invoked the defence of qualified privilege here to negative the *prima facie* case of libel made against them by the plaintiff. (paras 49 & 51)

Case(s) referred to:

Ayob Saud v. TS Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 HC ***(refd)***

Dato' Seri Mohammad Nizar Jamaluddin v. Sistem Televisyen Malaysia Bhd & Anor [2014] 3 CLJ 560 CA ***(refd)***

Khalid Yusoff v. Pertubuhan Berita Nasional Malaysia (Bernama) & Ors [2014] 8 CLJ 337 HC ***(refd)***

PP v. Mohd Yazid Mohd Sheriff Kes Jenayah No. 45-12-03-2013 (Unreported) ***(refd)***

Reynolds v. Times Newspapers Ltd [2001] 2 AC 127 ***(refd)***

S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC ***(refd)***

Syarikat Bekalan Air Selangor Sdn Bhd v. Tony Pua Kiam Wee [2015] 8 CLJ 477 FC

Watt v. Longsdon [1930] 1 KB 130 ***(refd)***

Legislation referred to:

Defamation Act 1957, ss. 11(1), 12, Schedule

Legal Profession Act 1976, s. 29(3)

For the plaintiff - Ku Abdul Rahman Ku Ismail; M/s Mirzawati & Assocs

For the 2nd & 4th defendants - Bhag Singh; M/s Bhag Sulaiman & Co

Reported by Sandra Gabriel

JUDGMENT

Lim Chong Fong JC:

Introduction

[1] This is a defamation action brought by an advocate and solicitor against The Star newspaper as well as its editor and journalist in relation to press coverage of court proceedings.

[2] The plaintiff is an advocate and solicitor practising in the firm of Messrs Ku Abdul Rahman & Associates at the material time in Penang.

[3] The fourth defendant is one of the leading newspaper publishers in Malaysia. The second defendant was then employed as the Acting Group Chief Editor (now Chief Operating Officer (Content Development)) of the fourth defendant while the third defendant was employed by the fourth defendant as journalist. The third defendant left the employment of the fourth defendant in June 2015.

Preliminary

[4] The trial of this action took one day on 13 June 2016. The first defendant was earlier struck off from the suit before the trial commenced.

[5] The trial documents were marked as bundles A to I including the documentary evidence contained in bundles B to E which were by consent of the parties classified as status B; meaning the authenticity of the documents were not disputed. In addition, exhs. D1 and D2 were admitted in evidence during the course of the trial.

[6] The following witnesses testified at the trial:

(i) Ku Abdul Rahman bin Ku Ismail ('PW1'), the plaintiff himself;

(ii) June Wong Har Leng ('DW1'), the second defendant herself; and

(iii) Priscilla Dielenberg ('DW2'), the third defendant herself.

[7] After the close of the trial, the parties submitted their respective written closing submissions and oral clarification with counsel was held on 12 August 2016.

Background Facts

[8] The plaintiff was counsel for the accused in the Penang High Court criminal case of *PP v. Mohd Yazid Mohd Sheriff* in Kes Jenayah No. 45-12-03-2013.

[9] The trial commenced on 10 March 2014 wherein the plaintiff cross-examined five of the prosecution witnesses on that day and on 11 March 2014.

[10] On 3 April 2014 when the case was fixed for continued hearing of the trial, the Deputy Public Prosecutor (first defendant) informed the learned judge that she learnt from a friend at the Bar that the plaintiff did not have his practising certificate for 2014 required under the Legal Profession Act 1976. She had checked with the Bar Council Malaysia and was informed that the plaintiff was only issued his practising certificate on 20 March 2014.

[11] The learned judge then directed the plaintiff and the Deputy Public Prosecutor to file written submissions as to whether the case could continue or had to re-commence *de novo*.

[12] The third defendant was present in the court to provide press coverage of the proceedings for the fourth defendant on that day.

[13] On 4 April 2014, the fourth defendant published the article captioned "lawyer told off over expired cert 'irresponsible act' may have affected hearing of drug trafficking case" ('impugned article') which is reproduced as follows *verbatim*:

> Lawyer told off over expired cert 'Irresponsible act may have affected drug trafficking case - By Priscilla Dielenberg Priesdberg@the star.com.my
>
> An accused trafficker's lawyer was ticked off by a High Court here for not informing the court that his Practising Certificate (PC) had expired. Justice Zamani Abdul Rahim told Ku Abdul Rahman Ku Ismail that the act was irresponsible and dishonest, The matter came to light when Deputy Public Prosecutor (DPP) Muna Mohamed Jaafar brought it to the court's attention yesterday. Ku Abdul Rahman then admitted that he had failed in his efforts to renew his PC on time for the hearing of the case on March 10 and 11, where five prosecution witnesses had testified. He said the PC was finally renewed on March 20. "Without a PC, you can't be a lawyer" said Justice Zamani, and likened it to driving without a driving license. The judge was upset that Ku Abdul Rahman knew but did not inform the court that his PC had expired during the hearing earlier. On both the dates, the five witnesses had testified against Ku Abdul Rahman's client, Mohd Yazid Mohd Sheriff, 37. He is charged with trafficking in 4,550 gm of cannabis in front of a food stall in Jalan Kubang Mene-rong, Tasek Gelugor, North Seberang Prai, at 9pm on Nov 18, 2012. Drug Trafficking is punishable with the mandatory death sentence under section 39B of the Dangerous Drugs Act 1952. Noting that the PC was not retrospective and only valid from the date of issuance, Justice Zamani then ordered the prosecution and defence to present written submissions on the validity of the evidence given by the five witnesses. "The court will decide on April 15 on the status of the case, whether it can continue from where it was left or *de novo* (from the beginning)," he said.

[14] The plaintiff on 10 April 2014 lodged a police report pertaining to the impugned article.

[15] On 17 April 2014, the learned judge permitted the plaintiff to continue with the case from where it was left off after he was satisfied that the plaintiff could validly conduct the case on 10 and 11 March 2014 pursuant to s. 29(3) of the Legal Profession Act 1976.

[16] The plaintiff thereafter brought this suit.

[17] Subsequently, the plaintiff on 5 May 2014 wrote his letter of demand to the fourth defendant demanding compensation of RM5,000,000.

A **Contentions Of The Parties**

[18] It is the plaintiff's case that the impugned article constituted a grave libel. The imputation in the impugned article particularly the phrases 'Lawyer told off over expired cert', 'irresponsible act', 'without a PC, you can't be a lawyer' said Justice Zamani and 'liked it to driving without a
B license' therein as pleaded is that the plaintiff is:

(i) a person of low integrity;

(ii) an irresponsible person;

(iii) an untrustworthy person;
C

(iv) a dishonest person;

(v) a person who could not be relied upon;

(vi) a person who wasn't qualified to engage in legal practice as an advocate and solicitor; and
D

(vii) a person who was negligent in the conduct of his client's case.

[19] The plaintiff also accused that the third defendant was malicious because she was more concerned with the Deputy Public Prosecutor's interests. The third defendant wrote the impugned article after consulting
E with the Deputy Public Prosecutor but not with the plaintiff. If the third defendant had clarified with the plaintiff, she would have realised that the practising certificate had retrospective effect.

[20] As the result of the libel, the plaintiff's professional reputation was
F jeopardised and he suffered irreparable damage.

[21] The fourth defendant conceded that the plaintiff has made out a *prima facie* case on libel. However, the second and third defendants contended a *prima facie* case has not been made out against them by reason that there was absence of publication on their part.

G **[22]** That notwithstanding, the second to fourth defendants contended that they were not liable based on the defence of absolute privilege as well as qualified privilege on the basis of the Defamation Act 1957 and the common law.

H **Findings Of The Court**

[23] The oft quoted case on libel is that of *Ayob Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 wherein Mohamed Dzaiddin J (later CJ) held at 324:

> In our law on libel, which is governed by the Defamation Act 1957, the
I burden of proof lies on the plaintiff to show (1) the words are defamatory; (2) the words refer to the plaintiff; and (3) the words were published.

see also *Khalid Yusoff v. Pertubuhan Berita Nasional Malaysia (Bernama) & Ors* [2014] 8 CLJ 337 which was relied upon by the plaintiff that referred to and followed that case.

[24] The fourth defendant conceded that the plaintiff has proved all the three elements of the tort of libel. Since the second and third defendants also conceded to the first and second elements of the tort, I will only deal with the third element on publication as far as it relates to both of them.

[25] In this respect, the second defendant testified that she was not involved in the publication of the impugned article whatsoever. She explained that as the group chief editor of the fourth defendant, she could not have possibly gone through all the reports that were intended to be published by the fourth defendant. This is clear from the following excerpts of her testimony at the trial:

Q: What was your responsibility as Group Chief Editor?

A: I was responsible for the overall co-ordination of the work in the Editorial Department.

Q: Does this mean that you have to go through and read and approved every item and story that is published?

A: No. I do not and cannot possibly go through every item and story that is published.

Q: Why do you say so?

A: By reason of the size of the newspaper, I have to delegate the task of approving and editing the stories to my subordinates.

...

Q: Do you recollect coming across this story before it was published?

A: I have no recollection of this story and I do not recollect it being raised at that evening meeting.

Q: Are there situations where you would personally go through a story?

A: There are certain situations in which I would actually read through the entire story.

Q: What kind of situation would it be?

A: One would be when an item is presented for discussion during our editorial meetings and views sought. If I am chairing the meeting my decision would be final unless that decision is overturned by the Managing Director.

Q: Is there any other situation where you would be involved?

A: Yes. This would be where a story was specifically brought to me for the purpose of getting my approval.

Q: Was this article specifically brought to you for getting your approval?

A: As far as I can remember, no.

[26] I have no reason not to believe the testimony of the second defendant. It was also not challenged in cross-examination by the plaintiff.

[27] In the premises, I find and hold that the plaintiff has failed to prove that the second defendant was involved in the publication of the impugned article.

[28] As for the third defendant, she testified that she was involved in the publication of the impugned article to the extent of what happened in the court on 3 April 2014. She jotted what she heard in a notebook which was admitted in evidence as D1. The third defendant emphasised that she was merely carrying out her duties *vis-a-vis* her employer, the fourth defendant. She handed over what she had written to the fourth defendant and she had no further involvement with the publication of the impugned article thereafter. This is seen from the following excerpt of her testimony at the trial:

Q: At this stage, was the article so laid out and with the heading added referred to you?

A: No. I was not.

Q: Do you have any say in whether the content is published or in the way the report is edited or positioned?

A: If I ask for it, I can give my views. However the sub-editor has the final say.

[29] Again I have no reason not to believe the testimony of the third respondent. It was likewise not challenged in cross-examination by the plaintiff.

[30] In the circumstances, I find and hold that there was limited publication of the impugned article by the third defendant to the extent that it was made only to the fourth defendant.

[31] Based on the concessions of the defendants and my foregoing findings in respect of publication, I therefore find and hold that the plaintiff proved a *prima facie* case of libel against the third and fourth defendants.

[32] As to the defences, I will firstly deal with the defence of absolute privilege raised by the third and fourth defendants.

[33] The relevant provision is s. 11 of the Defamation Act 1957 which reads as follows:

11. Reports of judicial proceedings

(1) A fair and accurate and contemporaneous report of proceedings publicly heard before any court lawfully exercising judicial authority within Malaysia and of the judgment, sentence or finding of any such court shall be absolutely privileged, and any fair and *bone fide* comment thereon shall be protected, although such judgment, sentence or finding be subsequently reversed, quashed or varied, unless at the time of the publication of such report or comment the defendant who claims the protection afforded by this section knew or ought to have known of such reversal, quashing or variation.

(2) Nothing in this section shall authorise the publication of any blasphemous, seditious or indecent matter or any matter the publication of which is prohibited by law.

[34] The plaintiff contended that s. 11 of the Defamation Act 1957 only applied to judgments written by judges, Magistrates and other judicial officers. I however, find that to be a rather blinkered interpretation. In my view, it is plain that judicial reporting by the press is captured in the initial portion of s. 11(1) of the Defamation Act 1957 while the grounds of judgment are captured in the subsequent portion of the same.

[35] From the evidence adduced before me particularly the testimony of the third defendant as well as my review of her notebook and the notes of court proceedings on 3 April 2015 which was admitted in evidence as D2, I am satisfied that she made a fair, accurate and contemporaneous report of the court proceedings held on that day as published in the impugned article on the following day 4 April 2015. In the premises, I hold that the third defendant and accordingly the fourth defendant were protected by absolute privilege conferred by s. 11 of the Defamation Act 1957 to negative the plaintiff's *prima facie* case of libel against them.

[36] I will next deal with the defence of qualified privilege as also relied upon by the third and fourth defendants.

[37] Generally, the common law on qualified privilege is explained by Wan Hamzah SCJ in the Supreme Court case of *S Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 as follows:

However, there are occasions upon which, on grounds of public policy and convenience, a person may, without incurring legal liability, make statements about another which are defamatory and in fact untrue: *Watt v. Longsdon* [1930] 1 KB 130. These occasions are called occasions of qualified privilege. A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty although it contains a criminatory matter which, without this privilege, would be slanderous and actionable: *Harrison v. Bush* [1855] 5 E & B at p. 348. **The duty may be legal, social or moral, and the person to whom the communication is made must have a corresponding interest or duty to receive it. The reciprocity is essential**: *Adam v. Ward* [1917] AC at p. 334. (emphasis added.)

[38] Furthermore, Abang Iskandar JCA held as follows in the Court of Appeal case of *Dato' Seri Mohammad Nizar Jamaluddin v. Sistem Televisyen Malaysia Bhd & Anor* [2014] 3 CLJ 560:

> [34] **In a defence of qualified privilege, truth is not a pre-requisite but it can only succeed if there is no malice in such publication**. If untrue defamatory allegations are published on an occasion of privilege, they will be protected from a claim for defamation. Although the law of defamation exists to protect reputations, it is recognised that in particular situations it is to the benefit of society generally for people to be able to communicate without the fear of being sued for defamation. This is so despite the risk that a person's reputation will be damaged and they will not be able to restore it by bringing a claim for defamation. Its rationale resides in the consideration that a general public good in such exercise overrides the need to protect individual reputation.
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> [35] Although the learned trial judge had considered the defence of qualified privilege and the *Reynold*'s defence, she did not actually come to a definitive conclusion on the matter. She had anchored her dismissal of the plaintiff's claim based on her earlier finding that the defendants had successfully established the defence of justification, which is an absolute and complete defence against a charge of defamation. Indeed, she had said, "However, I need to emphasise here that earlier on in this judgment, I had held that the complete defence of justification of the defendants is allowed, and that the plaintiff's action ought to be dismissed on that ground." It is clear in the ten guidelines as outlined in the case of *Reynolds v. Times Newspapers Ltd and Others* [2001] 2 AC 127 one of them has been the requirement that the defendant has to verify the information to be published from the maker of the same. Despite such failure on the part of the defendants to so verify, the learned trial judge had proceeded to rule that although the defendants had failed to practice responsible journalism by not verifying with the plaintiff on his tweet messages, such failure was mitigated by the absence of malice on the part of the defendants. In short she had not seen anything amiss beyond that.
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> [36] *In the defence of qualified privilege, the underlying exonerating element is that the defamatory statements were made without malice. The law is that it lies on the plaintiff to show that there was malice that had actuated the defendant when he published the impugned statements. In other words, it is not for the defendant to show that it had published the impugned statement without malice*. We noted that the plaintiff in this case had recognised this and had averred in his reply to the statement of defence that the defendants had published the news report with malice aforethought.
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> [37] We are of the view that malice, not unlike intention, is a state of mind. Invariably, unless there is an express admission by the defendant that he has been malicious in his conduct, then the presence of malice can only be deduced or inferred from the circumstances obtaining in each case. In the case of *S Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233; [1988] 2 MLJ 173 Wan Hamzah J (as he then was) had this to say on the subject matter of malice, at p. 179 of the report:

> Where the defendant purposely abstained from inquiring into the facts or from availing himself of means of information which lay at hand when the slightest inquiry would have shown the true situation, or where he deliberately stopped short in his inquiries in order not to ascertain the truth, malice may rightly be inferred. (emphasis added)

[39] As for the third defendant, it was contended that she is entitled to rely on the defence of qualified privilege in having published the offensive material to her employer, the fourth defendant in the course of her employment. This is because communications between employer and employee enjoyed such privilege as alluded to by Scrutton LJ in *Watt v. Longsdon* [1930] 1 KB 130 as follows:

> ... if a man has information materially affecting the interests of another, and honestly communicates it to that other, he is protected, though he has no personal interest in the subject matter, and that his protection arises from "the various social duties by which man are bound to each other, and that it was the duty of the defendant to communicate this information to the owner."

[40] In this regard, I do not see why I ought not to follow the case. The plaintiff has also not tendered any case authority to the contrary. In my view, the third defendant had a higher contractual duty to communicate her report to the fourth defendant pursuant to her employment contract. Hence, I find and hold that the third defendant enjoyed qualified privilege in defence to the plaintiff's claim for libel.

[41] In respect of the defence of qualified privilege relied upon by the press, the plaintiff submitted the approach should be that as held by the House of Lords in *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127. In that case, Lord Nicholls held as follows:

> Over the years the courts have held that many common form situations are privileged. Classic instances are employment references, and complaints made or information given to the police or appropriate authorities regarding suspected crimes. The courts have always emphasised that the categories established by the authorities are not exhaustive. The list is not closed. The established categories are no more than applications, in particular circumstances, of the underlying principle of public policy. The underlying principle is conventionally stated in words to the effect that there must exist between the maker of the statement and the recipient some duty or interest in the making of the communication. Lord Atkinson's dictum, in *Adam v. Ward* [1917] A.C. 309, 334, is much quoted:
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> > ... a privileged occasion is ... an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential'.

A The requirement that both the maker of the statement and the recipient must have an interest or duty draws attention to the need to have regard to the position of both parties when deciding whether an occasion is privileged. But this should not be allowed to obscure the rationale of the underlying public interest on which privilege is founded. The essence of this defence lies in the law's recognition of the need, in the public interest,
B for a particular recipient to receive frank and uninhibited communication of particular information from a particular source. That is the end the law is concerned to attain. The protection afforded to the maker of the statement is the means by which the law seeks to achieve that end. Thus the court has to assess whether, in the public interest, the publication should be protected in the absence of malice.
C

In determining whether an occasion is regarded as privileged the court has regard to all the circumstances: see, for example, the explicit statement of Lord Buckmaster L.C. in *London Association for Protection of Trade v. Greenlands Ltd.* [1916] 2 A.C. 15, 23 ('every circumstance associated with the origin and publication of the defamatory matter'). And circumstances
D must be viewed with today's eyes. The circumstances in which the public interest requires a communication to be protected in the absence of malice depend upon current social conditions. The requirements at the close of the twentieth century may not be the same as those of earlier centuries or earlier decades of this century.

E Frequently a privileged occasion encompasses publication to one person only or to a limited group of people. Publication more widely, to persons who lack the requisite interest in receiving the information, is not privileged. But the common law has recognised there are occasions when the public interest requires that publication to the world at large should be privileged. In *Cox v. Feeney* (1863) 4 F. & F. 13, 19, Cockburn C.J.
F approved an earlier statement by Lord Tenterden C.J. that 'a man has a right to publish, for the purpose of giving the public information, that which it is proper for the public to know'. Whether the public interest so requires depends upon an evaluation of the particular information in the circumstances of its publication. Through the cases runs the strain that, when determining whether the public at large had a right to know the
G particular information, the court has regard to all the circumstances. The court is concerned to assess whether the information was of sufficient value to the public that, in the public interest, it should be protected by privilege in the absence of malice.

This issue has arisen several times in the context of newspapers
H discharging their important function of reporting matters of public importance. Two instances will suffice, together with one instance of the publication in book form of information originating with the publisher. *Purcell v. Sowler* (1877) 2 C.P.D. 215 concerned a newspaper report of a public meeting of poor-law guardians. During the meeting the medical officer of the workhouse at Knutsford was said to have neglected to
I attend pauper patients when sent for. In deciding that publication of this allegation was not privileged, the Court of Appeal looked beyond the subject-matter. The court held that the administration of the poor-law was a matter of national concern, but there was no duty to report charges

made in the absence of the medical officer and without his having had any opportunity to meet them. The meeting was a privileged occasion so far as the speaker was concerned, but publication in the press was not. In *Allbutt v. General Council of Medical Education and Registration* (1889) 23 Q.B.D. 400, 410, the defendants published a book containing minutes of a meeting of the council recording that the plaintiff's name had been removed from the medical register for infamous professional conduct. This was after an inquiry at which the plaintiff had been represented by counsel. The Court of Appeal held that the publication was privileged. Giving the judgment of the court, Lopes L.J. expressly had regard to the nature of the tribunal, the character of the report, the interests of the public in the proceedings of the council and the duty of the council towards the public. *Perera v. Peiris* [1949] AC 1, 21, was an appeal to the Privy Council from the Supreme Court of Ceylon. The 'Ceylon Daily News' had published extracts from a report of the Bribery Commission which was critical of Dr. Perera's lack of frankness in his evidence. The Judicial Committee upheld a claim to qualified privilege. In the light of the origin and contents of the report and its relevance to the affairs of Ceylon, the due administration of the affairs of Ceylon required that the report should receive the widest publicity.

The courts have recognised that the status and activities of certain bodies are such that members of the public are entitled to know of their proceedings. Then privilege derives from the subject-matter alone. Fair and accurate reports of the proceedings of these organisations are privileged. *A leading instance is Wason v. Walter (1868) L.R. 4 Q.B. 73, 89, concerning newspaper reports of debates in Parliament. The Court of Queen's Bench held, by analogy with reports of judicial proceedings, that fair and accurate reports of parliamentary proceedings were privileged. Cockburn C.J. observed that it was of paramount public and national importance that the proceedings of either House of Parliament should be communicated to the public 'who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends'* ... (emphasis added)

[42] The *Reynold*'s privilege defence has been accepted by the Federal Court in *Syarikat Bekalan Air Selangor Sdn Bhd v. Tony Pua Kiam Wee* [2015] 8 CLJ 477 wherein Azahar Mohamed FCJ held as follows:

[33] In our view, the public interest defence should by no means synonymous with journalists or media publications. On the ground of public interest, there is a sufficient basis it should be in the same way extended to anyone who publishes or discloses material of public interest in any medium to assist the public better comprehend and make an informed decision on matters of public interest that affects their lives. To safeguard the extension of this privilege is not abused, as a necessary balance, it is the duty of the court to robustly ensure that anyone who is accorded with the privilege meet the test of responsible journalism, about which more will be said later in this judgment. This, in our view, underpins the significance of protecting the right of freedom of expression on public interest matter and at the same time providing adequate protection for reputation. Freedom of expression is not absolute. Indeed,

freedom of expression and the responsibilities that comes with it is enshrined in art. 10 of the Federal Constitution. We should like to emphasise here that the *Reynolds* privilege defence places a considerable role in the hands of judges to deliberate fairly and come to a just decision with utmost care whether the impugned publication amount to an occasion of privilege.

[34] *The Reynolds privilege defence is predicated on public interest and "responsible journalism". In the context of the present case, the Reynolds privilege defence required the defendant first, to establish that the impugned words were uttered on a matter of public interest and the public had a corresponding interest in receiving the same. Once that was established, the court must consider whether the defendant acted reasonably in publishing the impugned words. This second test has been described as the test of "responsible journalism"* (see *Reynolds v. Times Newspapers Ltd* (*supra*) and *Jameel And Another v. Wall Street Journal Europe Sprl* (*supra*). Although the test refers to "journalism", it is merely a convenient description because as we have decided earlier the *Reynolds* privilege defence is in no way limited to journalistic publications. **If the defendant passed the test of responsible journalism, the issue would be determined in his favour**. Lord Nicholls in *Reynolds v. Times Newspapers Ltd (supra)* sets out a number of factors to be taken into account in determining the issue of responsible journalism. These factors, which are not exhaustive, are, *inter alia*, as follows:

(1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.

(2) The nature of the information, and the extent to which the subject matter is a matter of public concern.

(3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.

(4) The steps taken to verify the information.

(5) The status of the information. The allegation may have already been the subject of an investigation, which commands respect.

(6) The urgency of the matter. News is often a perishable commodity.

(7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.

(8) Whether the article contained the gist of the plaintiff's side of the story.

(9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

(10) The circumstances of the publication, including the timing. (emphasis added)

[43] Besides the common law, there is also s. 12 of the Defamation Act 1957 that provides as follows:

> 12. Qualified privilege of newspapers
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> (1) Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in Part I of the Schedule to this Act shall be privileged unless the publication is proved to be made with malice.
>
> (2) In an action for libel in respect of the publication of any such report or matter as is mentioned in Part II of the Schedule to this Act, the provisions of this section shall not be a defence if it is proved that the defendant has been requested by the plaintiff to publish in the newspaper in which the original publication was made a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances.
>
> (3) Nothing in this section shall be construed as protecting the publication of any blasphemous, seditious or indecent matter or of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit.
>
> (4) Nothing in this section shall be construed as limiting or abridging any privilege subsisting (otherwise than by virtue of the Libel Enactment of the Federated Malay States [F.M.S. Cap. 70] and the Libel Ordinance of the Straits Settlements [S.S. Cap. 56] repealed by this Act) immediately before the commencement of this Act.

This section is however, inapplicable here by reason that Part 1 and Part II of the Schedule to the Defamation Act do not encompass court proceedings in Malaysia.

[44] It is indisputable that the fourth defendant being one of the leading newspaper publishers in the country has the duty to disseminate news that includes the reporting of judicial proceedings to the Malaysian public at large. In this sense, it is my view that the public interest test is therefore met. The critical question here is whether the fourth defendant satisfied the second test of having exercised responsible journalism.

[45] On the facts herein, the impugned article was published in The Star newspaper on the next day after the court proceedings. There is nothing abnormal or sinister here because the reporting of court proceedings is usually reported contemporaneously by reason that news is a perishable commodity.

[46] I have in para. 35 above concluded that the reporting made by the third defendant was fair, accurate and contemporaneous. Although the contents of the impugned article contained serious accusations made against the plaintiff, it primarily reflected the actual exchanges that went on between the judge, Deputy Public Prosecutor and plaintiff in the courtroom as observed by the third defendant. Beyond the third defendant's report, there

was merely supplementation added into the impugned article by the fourth defendant by way of the caption, photograph of the plaintiff and background facts of the court proceedings. I find the photograph and background facts innocuous. As to the caption, I find that it was also fair and reflective of the contents of what actually happened in court.

[47] Since the impugned article is basically in substance the report of the actual court proceedings, I hold that responsible journalism has been satisfied by the fourth defendant if the report was accurate and fair. The fourth defendant has met that requirement. In the circumstances it is unnecessary in my view for the third and fourth defendants to carry out an investigation into it, particularly to inquire from the parties on the merits of the accusations made before the judge.

[48] Responsible journalism may not be synonymous with absence of malice. In any event, the burden is on the plaintiff to prove that the third and fourth defendants were actuated by malice. The defence of qualified privilege would be defeated if malice is proved.

[49] I observed that the plaintiff has alleged that the third defendant was malicious in that she sought clarification from the Deputy Public Prosecutor but not from him. In this regard, I accept the testimony of the third defendant that she merely checked with the Deputy Public Prosecutor to satisfy herself what she had heard in court was correct. There was nothing malicious in so checking in my view. In fact, the third defendant was wise to have done so to ensure accuracy in the reporting. It might have been different if the Deputy Public Prosecutor provided additional allegations to embellish her position which was then reported by the third defendant. This is however plainly not the case here.

[50] Besides that allegation, there was no other instance of malice advanced by the plaintiff, in particular, *vis-a-vis* the fourth defendant. I also noted that prior to the filing of this suit, the plaintiff did not request the fourth defendant to publish in The Star newspapers a reasonable statement by way of explanation or contradiction in respect of the impugned article. The plaintiff's letter of demand to the fourth defendant was made after this suit was brought.

[51] In the absence of malice as seen from the circumstances herein, I therefore find and hold that the third and fourth defendants have also successfully invoked the defence of qualified privilege here to negative the *prima facie* case of libel made against them by the plaintiff.

Conclusion

[52] For the foregoing reasons, I find and hold that the plaintiff's claim is unsustainable and is hence dismissed with costs of RM3,000 collectively for all the second to fourth defendants.